IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

Writ Petition No.4626 of 2005

Sam Rustomji Lakdawalla and ors..Petitioners
vs
The Trust for Funds and Profits
of the Parsi Panchayat & Ors. ..respondents

Mr.R.A.Thorat for P R Chandani for petitioners
Mr.Gaurav Joshi i/b P S Dani for respondents

CORAM: A.P.SHAH J.
Dated 26.l0.2005

P.C:

. Rule. Learned counsel appearing for the respondents waives service. By consent, rule is made returnable forthwith.

. The short question falling for my determination in this petition is whether a suit for declaration and mandatory injunction already instituted against the defendants has abated or not consequently upon the death of the plaintiff.

. Only few facts need to be stated in order to appreciate the controversy. The lst respondent is a public charitable trust and one of the objects of the respondent trust is to provide housing to the poor and middle class Parsis under the scheme framed by the trust called "Merit Ranking

Scheme",hereinafter referred to as MSR for the sake of brevity. The deceased plaintiff, a widow aged about 80 years had applied for residential accommodation under respondents' MRS on 2.l2.l959. The lst petitioner is the son and 2nd petitioner is the grand son of the plaintiff and are shown as persons residing with the plaintiff in the aforesaid application. The plaintiff was residing with her family in a building known as Prospects Chambers which was in a dilapidated and irreparable condition and ultimately collapsed sometime in May l983 and the plaintiff and the petitioners became shelterless. The plaintiff and the petitioners were forced to take refuge in Parsi Sanitarium at Cumbala Hill for several months. During this period the daughter of the plaintiff, on compassionate ground, was provided housing accommodation by her employer and the plaintiff alongwith the petitioners shifted in quarters allotted to the daughter of the plaintiff and continued to reside there during her lifetime. The grievance of the plaintiff was that despite lapse of nearly 50 years no accommodation was allotted to her and instead the respondents on 8.l.2004 gave a public notice inviting offers from Parsis for giving flats in Cusrow Baug on leave and licence basis and demanded Rs. l lac alognwith the offer.

The plaintiff therefore filed the present suit for declaration and mandatory injunction. The plaintiff died on 22.l0.2004 and a Chamber Summons was taken out by the petitioners for being added as party in place of the plaintiff. The daughter of the plaintiff since was earning good salary and was not eligible for charitable housing did not join in the Chamber Summons. The Chamber Summons was dismissed by the trial court holding that the cause of action was personal to the deceased plaintiff and same has died with the death of the plaintiff.

. I have heard Mr. Thorat learned counsel appearing for the petitioners and Mr.Joshi learned counsel appearing for the respondents. In my opinion the impugned order is wholly unsustainable. Order 22 rule 3 sets out rights of the legal representatives to continue the proceedings instituted earlier by the deceased plaintiff, if the right to sue survives and reads as follows:

> "3.Procedure in case of death of one of several plaintiffs or of sole plaintiff-
>
> (l) Where one of two or more plaintiffs dies and the right to sue does not survive to e surviving plaintiff or plaintiffs, alone, or

a sole plaintiff or sole surviving plaintiff dies and the right to sue survive, the court on an application made in that behalf shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within the time limited by law no application is made under sub-rule(l), the suit shall abate so far as the deceased plaintiff is concerned and on the application of the defendant, the court may award to him the cost which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff"

. In Puran Singh vs State of Punjab, (l996) 2 SCC 205 the Apex Court observed as under:

A personal action dies with the death of the person on the maxim action personalis moritur cum persona. But this operates only a limited class of actions ex delicito, such as action for damages for defamation, assault or other personal injuries not causing the death of the party, and in other

actions where after the death of the party the granting of the relief would be nugatory. (Girja Nadini Devi v Bijendra Narain Choudhary) But there are other cases where the right to sue survives inspite of the death of the person against whom the proceeding has been initiated and such right continues to exist against the legal representative of the deceased who was a party to the proceeding. Order 22 of the Code deals with this aspect of the matter. Rule l of Order 22 says that the death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives. That is why whenever a party to a suit dies, the first question which is to be decided is as to whether the right to sue survives or not. If the right is held to be a personal right which is extinguished with the death of the person concerned, and does not devolve on the legal representatives or successors, then it is an end of the suit. Such suit therefore, cannot be continued.

But is the right to sue survives against the legal representatives of the original defendant, then procedures have been

prescribed in Order 22 to bring the legal representatives on record within the time prescribed.

In view of rule 4 of Order 22 where one or two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant dies and the right, to sue survives the court, on an application being made in that behalf, shall cause the legal representatives of the deceased defendant to be made a party and shall proceed with the suit. If within the time prescribed by Article l20 of the Limitation Act, l963 no application is made under sub-rule (l) of rule 4, the suit shall abate as against the deceased defendant. This rule is based not only on the sound principle that a suit cannot proceed against a dead person, but also on the principle of natural justice and if the original defendant is dead, then no decree can be passed against him so as to bind his legal representatives without affording an opportunity to them to contest the claim of the plaintiff .Rule 9 of Order 22 of the Code prescribed the procedure for

setting aside abatement."

. In the light of the aforesaid legal position we will now consider whether in the facts of the case the right to sue survives after the death of the plaintiff. There is no dispute that the application for housing was made by the deceased plaintiff for the benefit of the family which includes the petitioners. The Scheme of the respondents contemplates transfer of application on the death of an applicant. Clauses II and III of the scheme read as follows:

"II. Transfer of periodicity points:

(a) To spouse or children:

An Applicant may apply to the trustees for transferring his/her periodicity points to the existing application of his/her-

i) Spouse
ii) Any one of the children/grand children
iii)Son in law land daughter in law.

The Administration should put up such an application to the housing committee of the

trustees, after a proper investigation of both the cases of the transfer applicant and the transferee applicant. The periodicity point be so given after a clearance from the Trustees.

b) To Divorced spouse:

In such cases, the periodicity of his/her valid application may be transferred to the divorced spouse, only if the divorcee produces a proof of being forced to leave the matrimonial home. The request for such a transfer be placed before the Housing Committee of the trustees after a scrutiny of the Divorce Decree.

c) Transfer of periodicity to brothers ;or sisters applications:

Such a transfer of periodicity, as a general rule, should not be affected. However, when brother/sister have applied jointly i.e. their names mentioned in the initial form, and all the other renewal forms, such a request be brought before the housing committee of the trustees for their

clearance.

III. Transfer of application on the death of an applicant:

In the case of a deceased applicant, his/her application may be transferred to his spouse or any one of the children or grand children or son in law/daughter in law or all others giving "No objection" and on furnishing death certificate. However, such applications should be valid on our records and within the prescribed norms".

. It is therefore clear that in the case of the deceased applicant his/her spouse or any one of the children or grand children are entitled to allotment of the charitable housing under the scheme. Mr.Joshi, however,submitted that the application filed by the plaintiff was rejected by the trustees after the suit was filed and, therefore, the heirs and legal representatives are not entitled to the allotment of house under the scheme. It is not possible to accede to the submission of Mr Joshi. For determining whether a right of action of the deceased plaintiff survives or not, the real question to be determined is

whether the legal representatives can enjoy the reliefs sought on the cause of action as claimed by the deceased plaintiff and not whether the legal representatives would be able to prove the grounds on the basis of which the relief is sought. The entitlement of the petitioners to claim allotment of the housing will be decided at the time of trial of the suit and the suit cannot be said to be abated on the death of the plaintiff. In the circumstances the impugned order of the learned trial judge is quashed and set aside. The Chamber Summons filed by the petitioners is allowed. Rule is made absolute accordingly with no order as to costs.